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Tax Strategies for Corporate Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations  
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**\*385 FIDUCIARY LITIGATION UNDER ERISA**

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ate where plan trustee had stated that all investment decisions were based exclusively on broker's advice and broker had told at least one trustee that the trustees had to follow his advice or find a new consultant); Brown v. Roth, 729 F. Supp. 391, 397 (D.N.J. 1990) ("provision of advice on two occasions is too infrequent to raise the inference that advice was provided on a regular basis"); Brink v. DaLesio, 496 F. Supp. 1350, 1374-76 (D. Md. 1980), aff'd and rev'd in part on other grounds, 667 F.2d 420 (4th Cir. 1981).

In the first decision addressing whether brokers/consultants to 401k plans could be considered fiduciaries based on their role, the court in Haddock v. Nationwide Fin. Servs. Inc., 419 F. Supp. 2d 156 (D. Conn. 2006), concluded that they could. \*393 Applying the "functional" test, payments made by mutual funds to an investment consultant in exchange for offering the funds as investment options could meet the test for plan asset if the mutual funds charged participants higher fees to recovery the cost of such payments.

#### d. Appointment of Plan Fiduciaries

The appointment of plan fiduciaries is itself a fiduciary function. 29 C.F.R. § 2509.75-8 at D-4; Hickman v. Tosco Corp., 840 F.2d 564, 566 (8th Cir. 1988); Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 735-36 (7th Cir. 1986); Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985); Leigh v. Engle, 727 F.2d 113, 116 (7th Cir. 1984); see also Birmingham v. SoGen Swiss Int'l Corp. Retirement Plan, 718 F.2d 515, 516 (2d Cir. 1983) (corporate directors may not interfere with retirement committee which is designated as "named fiduciary"; directors nonetheless have residual fiduciary duties to overrule committee actions in certain circumstances); Mobile, Alabama-Pensacola, Florida Bldg. & Constr. Trades Council v. Daugherty, 684 F. Supp. 270, 275 (S.D. Ala. 1988); Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 640-41 (W.D. Wis. 1979).

If a plan instrument confers upon a fiduciary the right to select and remove other fiduciaries, this authority carries with it an ongoing "duty to monitor" those persons whom the fiduciary may remove. See 29 C.F.R. § 2509.75-8 at FR-17; Leigh v. Engle, 727 F.2d 113, 135 (7th Cir. 1984); Atwood v. Burlington Indus., 18 EBC 2009 (M.D.N.C. 1994); Newton v. Van Otterloo, 756 F. Supp. 1121, 1132 (N.D. Ind. 1991) (directors have duties to monitor plan fiduciaries whom they appoint but do not breach duties in the absence of "notice of possible misadventure by their appointees").

#### e. Insurers as Fiduciaries

Another category of cases which follows the functional fiduciary approach involves insurers that have been held to be exercising control over management of plan assets due to their ongoing discretion over contracts sold to plans for investment of plan assets.

In John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993), the Supreme Court resolved a circuit conflict by holding that an insurer becomes a fiduciary with respect to assets in its general account that support a contract issued to an ERISA plan to the extent that the return credited to the plan under the contract is not fixed. See also Chicano Bd. Options Exch., Inc. v. Connecticut Gen. Life Ins. Co., 713 F.2d 254, 258-60 (7th Cir. 1983) (insurer retained discretion to amend annuity contract to restrict withdrawals).

In response to John Hancock, Congress amended § 401 of ERISA in August 1996 to relieve insurers who hold assets in their general account from any liability both for \*394 acts prior to its enactment and, for a defined period, for future acts that otherwise might give rise to a claim under Part 4 of ERISA, unless a civil action had been commenced by the plaintiff before November 7, 1995. The ERISA Clarification Act, as it was called, has withstood constitutional challenges in courts. See Adkins v. John Hancock Mut. Life Ins. Co., 957 F. Supp. 211 (M.D. Fla. 1997); Tool v. National Employee Benefit Servs., Inc., 957 F. Supp. 1114 (N.D. Cal. 1996).